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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

No. 58

KEOKUK & HAMILTON BRIDGE COMPANY,
A CORPORATION,

vs.

THE UNITED STATES,
APPELLANT.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

F. T. HUGHES,
Solicitor for Appellant.

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We challenge the statement of the solicitor general in his brief that under the reserve power of Section 13 of the Acts of July 25, 1866, to alter or amend appellant's charter the Government could in the improvement of navigation of the river if it so orders cause appellant's bridge or its piers to be entirely removed and this as we understand without compensation. When appellant had accepted its charter to build its bridge and the same was built and approved by the Secretary of War this became a contract within the meaning of the *Dartmouth College* case, 4 Wheat., and the *Monongahela Navigation Company against United States*, 148 U. S. 312-341, and the authorities under page 13 of our brief, and the Government could only in any event cause appellant's bridge or piers to be destroyed or removed upon just compensation being paid within the Fifth Amendment to the Federal Constitution.

II.

The *Bedford case in* 192 U. S. 207 is an authority for appellant rather than that of appellee. The case only holds that the injury from overflow and erosions to the lands of a riparian proprietor as the result of the action of the Mississippi River through a series of years is not such a direct consequence of the construction by the Federal Government some six miles farther up the stream of a revetment along the banks which di dnot change the course of the river as it then existed, but operated to prevent further changes as to make such governmental action a taking of private property for public use within the meaning of the Fifth Amendment to the Federal Constitution.

The injury done to the claimant's land was an effect of natural causes. The injury caused by the Government was by interrupting the course of natural causes, i.e., the further change in the course of the river and is also conjectural.

So that the facts in the *Bedford case* are distinguished from the *Lynah case*, 188 U. S. 445, in the cause and manner of the injury. In the *Lynah case* the works were constructed in the bed of the river obstructing the natural flow of its water and held to have caused as a direct consequence the overflow of Lynah's plantation. So with the case at bar. The work of deepening the channel in the bed of the river was right along the side of appellant's protection pier and of necessity destroyed it. The Government knew in contemplation of law what would probably happen. It was not conjectural nor in doubt. The consequences and the damages was or could have been easily ascertained. As we show on page 29 of our brief, and this was a taking of appellant's property and calling for compensation under the Fifth Amendment.

Page 10 of his brief says that the record presents a case *damnum absque injuria* for the findings of fact do not show that the appellant company was at any expense in rebuilding the old protection pier

because as he states, "For all that appears before either repairs were made or rebuilding commenced it became necessary, not on account of government act, but because the demands of commerce to rebuild the bridge entirely for heavier traffic and in connection with such rebuilding of the bridge an entirely new protection pier was constructed." Therefore he argues that the destruction of appellant's protection pier was a benefit rather than a damage.

Not one word of the testimony can support this contention. On the contrary both the appellant and appellee show that the bridge was not reconstructed nor the old piers and protection piers touched and that under the authority of the Act of March 4, 1915, the appellant was bound to submit the plan for reconstruction in whole or in part to the Secretary of War for his approval and then Major Hoffman, Major Corps of Engineers, and who spoke for the Secretary of War says, "Nothing in the way of repairs or reconstruction therefor was done and authority for a *new superstructure* was finally granted and the work is *now proceeding* towards completion." This of itself shows that the piers of the bridge and protection piers were not and could not be effected by the rebuilding of the superstructure to accommodate heavier traffic. M. Meigs, U. S. C. E., of this city, shows that the plan for reconstruction of the Keokuk & Hamilton bridge at Keokuk, Iowa, 1915, had nothing to do with the old piers but simply a new superstructure with the main floor of the bridge exclusively for railroad trains and the upper floor for vehicular and pedestrian travel and the affidavits in appendix to our brief page 31 shows by all the authorities that nothing was done to the piers nor could have been done under authorities of the Government and therefore the claim that the damage done by the blasting was slight and did not necessitate the rebuilding of the pier is without any color of fact or authority in law whatever and the undisputed testimony of Cole, the manager of the bridge and two or three other persons on the bridge and others who knew about it, testified that the blasting lasted for some months and absolutely destroyed the protection pier so as to require an entirely new pier and that was the only reason for making a new pier, and the finding of the court below to the effect that the damage was about one

thousand dollars and the reconstruction of the pier was necessitated by the acts of the appellant is without any evidence whatever, and as we have said a finding against the undisputed evidence and all the facts and circumstances in the case is not a finding that prevents the appellant from raising this question in this court of the finding as a matter of law and this finding should have been for appellant instead of appellee.

The case as we present it does not show a "fictitious taking with a fictitious damage", but an actual taking and an actual damage.

Respectfully submitted,

F. T. HUGHES,
Solicitor for Appellant.

September, 1922.